Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1997

CHARLES M. VORHEES, as Executor of the Last Will and Testament of **Helen V. Brach**, a person presumed dead,

Petitioner,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation; **WILLIAM L. BLAKE**, Director of the Division of Aeronautics of the Department of Transportation; **COUNTY OF DUPAGE**, a political subdivision of the State of Illinois; **CITY OF NAPERVILLE**, a municipality organized under the laws of the State of Illinois; **CITY OF AURORA**, a municipality organized under the laws of the State of Illinois; **NAPER AERO CLUB, INC.**, an Illinois Not-For-Profit Corporation; and the **HAZEL S. BRODIE TRUST**,

Respondents

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a federal district court without jurisdiction to grant a declaratory judgment as to the enforceability of a state statute on federal constitutional grounds when such statute selectively bars the utilization of a person's property upon the basis that such issue has not ripened given the final decision requirement under Williamson County:

a) when that statute imposes criminal sanctions for its violation and effectively mandates that a property owner suffer the intrusion of repeated low level overflights of his property and refrain from all interference therewith as would arise from its improvement in normal course to his great economic loss;

b) when the provisions of such statute do preclude the possibility of their alleviation by way of any authorized regulatory process, as was applicable with respect to the restrictions involved in Williamson, with the result that there was offered the possibility that stringent and absolute terms of the offending regulation could be varied and thereby eliminated;

c) when the purpose served by the statute is solely the insurance of the perpetual usability of a private airstrip from which small personal aircraft are operated by private persons in pursuance of their aviation hobby which would be inoperable absent the taking statutorily of a significant and valuable attribute of an adjoining land owner's property which is necessary to its development in accord with otherwise legitimate expectations of its owner; and,

d) when the taking sustained by the disadvantaged owner constituted by that usurpation of his property is not compensable in that the taking involved is for a private as opposed to a public interest.

PARTIES TO THE PROCEEDINGS

The Petitioner is Charles Vorhees as Executor of the Last Will and Testament of Helen V. Brach, a person presumed dead. The Respondents are Kirk Brown, Secretary of the Illinois Department of Transportation; William Blake, Director of the Division of Aeronautics of the Department of Transportation; County of DuPage, a political subdivision of the State of Illinois; City of Naperville, a municipality organized under the laws of the State of Illinois; City of Aurora, a municipality organized under the laws of the State of Illinois; Naper Aero Club, Inc., an Illinois not-for-profit corporation; and the Hazel S. Brodie Trust.

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For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles M. Vorhees, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but is included herein in App. A. The related orders of the District Court are unreported, but are included herein at Apps. C and D.

JURISDICTION

The decision of the Seventh Circuit was entered on February 4, 1998, Apps. A and B. Petitioner filed a timely petition for rehearing, and rehearing was denied on March 17, 1998, App. F. and

ammended order thereon was entered on March 19, 1998, App. E. The petition for writ of certiorari has been timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY ISSUES

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United State Constitution in Section 1 thereof provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

620 ILCS 5/22. Airport hazard defined

§ 22. "Airport hazard" means any structure, object of natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or restricted landing area or is otherwise hazardous to such landing or taking off.

620 ILCS 5/33. Enforcement of aeronautics laws

§ 33. Enforcement of aeronautics laws. It shall be the duty of the Department, its officers, and such of its employees as are designated by it to do so, to enforce and assist in the enforcement of all laws of this State pertaining to aeronautics, and of all rules, rulings, regulations, orders and decisions issued by the Department pursuant thereto, and in aid of such enforcement, general police powers are hereby conferred upon the Department, each of its officers, and such of its employees as are designated by it to exercise such powers. It shall also be the duty of every State, county and municipal officer charged with the enforcement of State and mu-

nicipal laws to enforce and assist in the enforcement of all laws of this State pertaining to aeronautics.

620 ILCS 5/49.1. Creation of hazards

§ 49.1. Creation of Hazards. No person may create or construct any airport hazard which obstructs a restricted landing area or residential airport that (1) serves 20 or more based aircraft, and (2) is located within the "metropolitan region" as that term is defined in the Regional Transportation Act. For the purpose of this Section, "based aircraft" are aircraft that are regularly hangared or tied-down at the restricted landing area or residential airport, or that use it as their primary base of operation. As used in this Section 49.1, "restricted landing area" or "residential airport" shall have the meaning set forth in regulations of the Department in effect on the effective date of this amendatory Act of 1989, but shall not include amendments of the regulations adopted by the Department thereafter.

620 ILCS 5/79. Penalties

§ 5/79. Penalties. Except as otherwise specifically provided in this Act, any person other than the Department, its officers or employees acting for and on behalf of the Department, who has failed to comply with the requirements of, or who has violated any of the provisions of this Act, or the rules, rulings, regulations, orders or decisions of the Department issued pursuant thereto, shall be guilty of a Class A misdemeanor.

STATEMENT OF THE CASE

Illinois has prohibited by Statute 620 ILCS 5/49.1 (hereinafter sometimes referred to as the "Statute") the effective development by the Petitioner, Charles M. Vorhees (hereinafter referred to as "Vorhees"), of large and significant parts of his 300 acre property. It is contiguous on the east and north to the City of Naperville and on its north to the City of Aurora—cities which have become two of the largest of Illinois apart from Chicago and as well the fastest growing municipalities in that State. By way of a boundary agreement between the two cities, Aurora is entitled to annex the westerly half of the parcel concerned, and Naperville the easterly half. Each municipality by law has jurisdiction with respect to the reasonable development of such.

The Illinois legislature has mandated that nothing be situated on any part of Vorhees' property which would interfere with the small aircraft that habitually take off and land from or on a short "residential" airstrip owned by the Respondent, Naper Aero Club, a private and select membership club. The residential development to which the Club has an affiliation has homes improved with airplane hangars which are served by taxiways leading to the airstrip which at its northerly end is contiguous to the southern boundary of Vorhees' property. It also maintains a second airstrip which is occasionally used and is contiguous for its entire 2,000 foot length of the southerly boundary of Vorhees' property. The enactment of the Statute was motivated by the fact that the airstrip was bound to become inoperable due to the nature of the anticipated development of Vorhees' property.

In *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 120 L.Ed. 2798, 112 S.Ct. 2886 (1992), this Court reiterated its precedencial holding that any compulsion of

> ...the property owner to suffer a physical "invasion" of his property...no matter how minute the intrusion and no matter how weighty the public purpose behind

it, we have required compensation. *Lucas Id.*112 S.Ct. at 2893.

Accordingly, Vorhees asserted in his complaint that Illinois has by its Statute taken a valuable aspect of his property and that he was entitled to have the Federal District Court enter a declaratory judgment holding that this statute is unconstitutional. He particularly noted in the course of supporting the soundness of this thesis that the *Lucas* court gave as a prime example of a *per se* taking the instance of low level overflights related in its landmark opinion in *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 106 (1946). Therein the Court conclusively determined that the space superadjacent to lands needed for their development was an integral part of the landowner's property. The *Lucas* court characterized such as the first of the two situations in which "we have found categorical treatment appropriate" as to the matter of a regulation being involved as "unconstitutional." *Lucas, supra* 112 S.Ct at 2893. The *Lucas* court went on to reflect that the Fifth Amendment is violated "when land use regulation 'does not substantially advance legitimate state interests.'" *Lucas Id.* at 2894.

Despite the fact that it was self-evident given the incontrovertible allegations of Vorhees' complaint as to the nature and situation of his property that adherence to this statutory regulation would result in a denial of his right to develop large portions of his land in accord with the expectations that would reasonably apply in that circumstance and that no substantial state interests were advanced through the enactment of it, and that only great economic loss to Vorhees had and would continue to result, he could not get the District Court to rule on the merit of his contention that it was necessary to the preservation of his constitutional rights that there issue a declaratory judgment that the Illinois Statute is unconstitutional. He further demonstrated that to permit the Statute to continue to be perceived as a valid regulation would allow there to be visited upon him current substantial economic loss and that a failure to enjoin each of the Respondents from enforcing or applying the illicit regulation embodied in the Statute would thus

result in irreparable harm to him and would deprive him of the utilization of his property to the extent he was justly entitled.

The refusal on the part of the District Court, App. C and D, and thereafter by the Court of Appeals, App. A, was in each instance grounded in the unwarranted supposition that there was an identity between the absolute legislative prohibition found in the Statute at issue and a traditional zoning ordinance subject to alleviation through variation by way of established administrative review processes.

In the instance of that to which Vorhees has been subjected, the court was shown through the allegations of his complaint, App. H, and his supporting briefs that there was no speculative factor as to the certitude of the statutory regulation being complained of and that the matter of its application for the very terms of the legislation not only did prohibit the possibility of such by implication but as well did provide for its precedence. Vorhees pointed out that the Statute which consists of several major sections including the following:

> 620 ILCS 5/22 which defines an airport hazard (see p. 2)
>
> 620 ILCS 5/49.1 which restricts the creation or construction of an airport hazard within the metropolitan region as defined in the Regional Transportation Act of Illinois (p. 3)
>
> 620 ILCS 5/33 which requires enforcement of the Statute by certain officials and political subdivisions as therein specified (p. 2); and
>
> 620 ILCS 5/79 which provides criminal penalties for the failure to comply with the Statute (p. 3)

did overlie the local regulatory process and did allow for no discretion as to its enforcement but rather did mandate, as is the case with criminal statutes, a need on the part of those affected to conform their conduct to it or to endure prosecution upon its viola-

tion. He made clear that any apparent success in obtaining alleviation from the burden placed upon his property by the illicit legislation would be of no moment for the Statute by its terms would not be overcome thereby and would still be subject to enforcement by the Naper Aero Club and the governmental Respondents—an action shown to be likely by allegations of his complaint and as well by their very vehemence in resisting even an examination of the constitutionality of the regulation concerned. App. H, pars. 22 and 23.

By virtue of Vorhees' complaint and the Illinois statutory regulation, facially that involved is a fundamental federal constitutional issue and given the premises, its very prevalence coupled with the inherent threat of its application to Vorhees, amounts to an actual controversy of the type particularly appropriate for declaratory judgment. Vorhees asserted that any rational construction of the Statute attests to its finality and that thus and therefore the contention that the issue is not ripe for determination is itself without foundation.

Vorhees asserts that the final decision ripeness doctrine as enunciated in *Williamson Co. Regional Planning v. Hamilton Bank* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 126 (1985) was erroneously applied by the court below when it held his cause was not ripe for adjudication in that he had not resorted to a nonexistent administrative review process by way of the submission of a development plan for his property nor had he sought recovery through litigation at the state level upon a theory that his property had been inversely condemned. App. H, par. 23. He consistently and rightly contended that even had the first option been available to him it would have been an exercise in futility as the statute of which he complains bars absolutely from large and significant portions of his property the very type of development for which it is suited. App H, pars. 22 and 23.

As to the attitude of the City of Naperville as a primary enforcement body, he pointed out in the course of his complaint that it had declared in an ordinance of it having to do with its policy as

to the development of his property that the viability of the operations of the Naper Aero Club were to be a primary consideration. He gave color to such by alleging that one of Naperville's staff lawyers speaking publicly for that city characterized even the thought that the Illinois Statute was unconstitutional as one wanting in sanity. App. H, par. 11.

As to the Seventh Circuit Court of Appeals' assertion that Vorhees' contention that the matter of the unconstitutionality of the Statute concerned was not ripe for a consideration by a federal court due to his failure to have sought compensation on the state level for the taking involved, Vorhees made it abundantly clear that the Illinois law to which he was admonished to resort denied him any such right when the taking was to serve, as is the case herein, a private interest. App. H, pars. 18 and 19. In connection with the Seventh Circuit's characterization that the interest being served by the Illinois Statute was a public one and that thus his remedy was the invocation in an Illinois court of his right to inverse condemnation on account of the taking involved, he pointed out to the court that it itself had in a published decision characterized a parallel circumstance as a private interest that would constitute a taking which would be unconstitutional as it would offer no possibility of compensation.[1]

A. Illinois by Statute prohibits significantly the development of Vorhees' lands and his realizing those expectations of it to which he is entitled.

Vorhees is the executor of the estate of Helen Brach, his sister, a person found to have presumptively died. As such he was vested with an undivided one-half interest in a 300 acre farm which his sister had acquired from her late husband, Frank Brach, who, together with his now deceased brother, Edwin, purchased the property in 1936. The other current co-owner of it, the Hazel S. Brodie

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[1] See discussion of the matter of *Gamble v. Eau Clare County* 5 F.3d 285 (7th Cir. 1993) at pgs. 22 and 23 of this petition in response to Opinion of Seventh Circuit Court of Appeals App. A at p. 9.

Trust, has acquired its interest from the said Edwin Brach. App. H, pars. 4 and 5. This DuPage County farm lies in the path of substantial commercial development. [It is bisected by one major roadway (Route 59) and borders another (75th Street)]. App. H, pars. 5, 6, and 15.

In 1956, a time when Vorhees' property and almost all surrounding it was devoted to the farming of corn and soy beans, two airstrips were constructed designed to serve the residents of a single-family-home community to be established to the south of Vorhees' farm. It was contemplated that usage of such airstrips would also be permitted by a select number of persons other than these residents so as to spread the costs of its operations among a larger group. The ownership of the airstrip is reposed in the Respondent, Naper Aero Club, Inc. The property which it owns was sufficient for the construction of runways having length of approximately 2,000 feet. One parallels and is contiguous for its length to Vorhees' property on the south. The other because of its situation is principal to the operation of the Naper Aero Club does end on its north at the very boundary of the Vorhees' property and thus for its usability is wholly dependent upon Vorhees' land remaining unimproved with roadways or structures on significant portions of it. For that reason, since 1956 aircraft utilizing such runways have habitually flown at low level over Vorhees' land in variable routes and directions with the result that maintenance of his property in a manner which would permit the persistence of such flights would leave it unsuitable for development. App. H, par. 12. And this is the case despite the fact that there has been wide-spread commercial and intensive residential development proximate to the Vorhees property which when taken together with its overall frontage of two miles along major arterial highways make it fit and desirable for a high level of commercial and residential usage. A use to which Vorhees could now be devoting it to his great economic benefit but for the aforesaid illicit regulation of Illinois. App. H, pars. 16 and 17.

The susceptibility of this property to intensive and high level development arose *circa* 1986. By 1990, the Naper Aero Club apprehended such to be a threat to its continued operations and it lobbied the Illinois legislature to enact a statute providing for criminal penalties designed to thwart the development of the Vorhees farm. Vorhees asserted the self-evident fact that the very prevalence of the statute serves to achieve that effect. App. H, pars. 19 to 20. Thus, he contends that the Statute is unconstitutional by virtue of the Fifth and Fourteenth Amendments of the Constitution of the United States and that it does present an actual matter in controversy ripe for determination by the Federal District Court. App. H, pars. 26 and 27. He points out that on its face the Statute deprives him of property without due process of law for the private use served precludes his being compensated therefor. App. H, par. 26. At no time did Vorhees submit a plan for the development of his property or seek the annexation and zoning of it to accommodate its appropriate use from either Naperville or Aurora for irrespective of any action by them the right of the Naper Aero Club to physically and substantially intrude into the space superadjancent to his land with which it was endowed by the Statute would remain. Vorhees' complaint demonstrated the finality of the action of the Illinois legislature and its adverse effect upon his exercise of his substantive constitutional right to his property and the actual matter in controversy presented thereby. App. H, par. 19.

B. Vorhees filed a complaint seeking from the District Court a declaratory judgment that the Statute in question was one violative of the Fifth and Fourteenth Amendments of the Constitution and seeking an injunction prohibiting his prosecution criminally thereunder and as well its application civilly to legitimize the usurpation by the Naper Aero Club of a significant aspect of his property

Vorhees filed a complaint, App. H, in the United States District Court for the Northern District of Illinois alleging that the very prevalence of the Statute and the resultant assumption of its

validity deprived him of a large portion of value of his property in violation of the Fifth and Fourteenth Amendments of the United States Constitution, App. H, par. 14, and seeking as a remedy therefor a declaratory judgment that such Statute was unconstitutional and the barring by injunction of any application of it to the detriment of his property rights. App. H and summarized in previous section. Officers of Illinois and various governmental subdivisions of it were mandated by its very terms to enforce the Statute and thus were made parties defendant as was the Naper Aero Club. App. H, par. 20. Vorhees demonstrated in the course of his definitive complaint that the Statute was both conclusive and criminal in nature and that that its mere prevalence had a chilling effect which resulted in an actual taking without due process and in violation of the equal protection clause. App. H, par. 25. He further demonstrated by his allegations that his economic loss was great and that the taking alleged was for private purpose and thus the remedy of inverse condemnation would never be available to him. App. H, pars. 23 and 25.

He further established by his complaint that the Statute precluded the granting of any administrative relief and mandated its enforcement, imposing severe penalties for its violation. App. H, par. 23.

It was thereby demonstrated that there was an actual matter of controversy which had reached a point where it was properly justiciable. Such premise was established as valid for his claim was not susceptible to rejection upon a basis of speculation that somehow the submission by him of a plan of development would result in a desultory approach to the Statute's enforcement resulting in a lesser consequence to Vorhees than the reality of the situation did establish. And that reality is that aircraft taking off and touching down at the point of the southerly border of Vorhees' property cannot do so vertically and instead gradually rise and descend in the course of low level flights over a variable course affecting a wide swath of Vorhees' property over and through areas which they otherwise wouldn't be able to fly insofar if there were placed

upon it roadways and structures within the vicinity of the flight paths so utilized.

C. The District Court's inquiry as to the factual situation was correctly restricted to the content of Vorhees' complaint but its determination that the matters presented therein were not ripe for adjudication was thus based upon the District Court's view of the applicable law

When all parties defendant, excepting for the Hazel Brodie Trust, moved for dismissal upon the basis that Vorhees' complaint for declaratory judgment and injunctive relief did not present an actual matter of controversy or one which was ripe for determination in the District Court, it of necessity focused upon and considered the factual allegations of Vorhees' complaint. In an order dated March 25, 1996, the District Judge Manning acknowledged the ascendancy of the complaint, but nevertheless granted Naperville's motion to dismiss Vorhees' complaint as one failing to state a cause of action complying with the Federal Rule of Civil Procedure 12(b)(1). In that regard it stated as follows:

> Upon review of plaintiff's complaint, we find that there are no allegations that plaintiff ever submitted plans, designs, drawings, formally or informally to the City of Naperville for the development of the subject property that was impacted by the Act. Further, there are no allegations that Naperville states any specific intent to impose the Act on any development plans for the subject property. There is no actual case or controversy before this court. App. D at 4.

Similarly, Judge Manning on September 20, 1996, in an order granting the motions of the other respondents (excepting the Hazel S. Brodie Trust) for dismissal of Vorhees' complaint stated:

> Our review of plaintiff's complaint leads us to conclude there is sufficient speculation on plaintiff's part determining the ultimate acts of defendants in this

> case. Until the plaintiff can allege specific acts which support a plan or until plaintiff obtains a final, definite decision from the local or state authorities which forbids the proposed development of the land, he has not alleged an actual case or controversy before this court. (Emphasis in original text of Court's memorandum and order.) App. E at 4.

Such construction of Vorhees' complaint does appear to be divergent with that which it sets forth with precision and most particularly with the reasonable construction to be placed upon the prohibitory regulation enacted by Illinois with respect to its finality and effect and most particularly does ignore the fact that not only is there no provision made for any zoning process to apply or alleviate the regulation involved but rather that such does set forth in relief with the test being whether any roadway or structure when in place or in use, as the case may be, would present a hazard to low flying aircraft. The primary enforcement provided for within the confines of the Statute is the imposition of penalties as a product of a usual form of criminal prosecution at trial of the offender. 620 ILCS 5/79.[2] The prospect of such criminal prosecution was ignored by the Court.

D. The Seventh Circuit held Vorhees' takings claim involving his assertion that an Illinois Statute had deprived him of an important aspect of his expectations as to the use and economic value of his property by virtue of its attempted legitimization of continuing intrusions upon his property inconsistent with its appropriate use as such was not ripe because he had not obtained a final decision regarding the application of such regulation or sought recovery of damages upon an inverse condemnation theory pursuant to state law

Vorhees timely appealed the judgment of the District Court to the Court of Appeals of the Seventh Circuit in an unpublished

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[2] A violation of the Aeronotics Act is classified as a Class A misdemeanor.

opinion that affirmed the District Court. The court below ignored the nature of the Statute attacked by Vorhees and instead considered it either as a traditional zoning ordinance subject to variable application to be tested through the submission of specific plans for development of the Vorhees property and alleviation by a variance or a taking obligating Vorhees as the objector to and victim thereof to exhaust at the state court level inverse condemnation procedures. The Court of Appeals concluded that the failure of Vorhees to pursue one or another of these courses—despite the fact that the allegations of his complaint implicitly established that neither was available to him—justified the denial to him of a review of the matter on its merits for under that court's "well-founded precedent, the plaintiff-appellant Vorhees has failed to produce a scintilla of evidence demonstrating that his claim is ripe for adjudication in the federal courts as a 'case or controversy.'"App. A at 8.

Vorhees contends that this conclusion was fully at odds with any reasonable analysis of his complaint and the nature of the Illinois Statute, the constitutionality of which he has drawn into question; and, furthermore, that it is as well in contradiction with the actuality of precedent provided by federal case law as to what constitutes finality and also with that aspect of Illinois law respecting the absence of any right for recovery on the basis of inverse condemnation when the taking be for private purpose.

And, furthermore, Vorhees points out that the Seventh Circuit failed to accord consideration to the fact that the Statute being questioned had as its sole purpose the prohibition of the development of a large portion of Vorhees' property and effectively limited the use thereof to the agricultural purpose to which it was presently devoted. He notes that the court did also fail to take cognizance of there being no rational basis for the differentiation of the Naper Aero Club airstrip from those many others situated throughout Illinois to which the Statute designedly did not apply, but instead acknowledged implicitly that the Statute in question was specifically adopted to deal with a limited and nonrepresenta-

tive situation when it quoted the sponsor of the legislation concerned as saying that the statute "applies to only three very small privately owned airports in Illinois." App. A. at 3.

In spite of this acknowledgement by the Seventh Circuit that Vorhees' property was thereby specifically targeted, it upheld the District Court's order and applied the *Williamson, supra,* two part test to determine when a takings claim is ripe for federal adjudication. It required thereby that petitioner must first obtain a final decision regarding the application of the zoning ordinance in issue otherwise a claim is not ripe. The court also required that the property owner in accord with the second part of the test seek compensation at the state level through the procedures provided by the state which it specifically noted that Illinois provides by way of the judicially created remedy of inverse condemnation. App. A, 5–7.

Rather, Vorhees contends that the court thereby ignored that which the legislature did by its enactment of the Statute which is something that is final as final can be and is unrelated to traditional zoning statutes of general application subject to amelioration in a zoning review process as was the case in *Williamson, id.* Instead Vorhees asserts that that done by virtue of the Statute is a "taking" as was stipulated in *Lucas, supra* wherein it was reiterated that previously held by the U.S. Supreme Court with respect to a state allowed physical intrusion upon a property. That said in such regard by the *Lucas* court is as follows:

> We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advised in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no mater how minute the intrusion and no matter how weighty the public purpose behind it, we have required compensation. *Lucas, id* S. Ct. at 2893.

Following upon the entry of the order of the Seventh Circuit Court of Appeals Vorhees filed a petition for a rehearing with a suggestion that such be *en banc*, which was denied.

ARGUMENT

I

The court ought grant the petition for writ of certiorari so as to clarify at what point a governmental regulation providing the intrusion upon real property is final and thus subject to an evaluation by a federal court as to its constitutionality and thereby provide a standard for the distinguishment of such from a traditional zoning ordinance subject to the Williamson County final decision ripeness doctrine

There ought be dispelled once and for all in the interest of preserving the fundamental right of citizens to utilize free from unjustified intrusion their real property any tendency on the part of courts to construe the ruling in *Williamson, supra*, as one which universally deprives federal courts of jurisdiction to evaluate the constitutionality of state and local law providing for regulation. While the doctrine in *Williamson* is one which sometimes is appropriate and while such does in the long run serve the interest of many prospective litigants, and effecting thereby a judicial economy of effort, it becomes an engine of injustice when it is unreasonably applied by way of calling for an exhaustion of irrationally supposed remedies which are nonexistent. A property owner ought not be faced with a labyrinth of seemingly endless processes seeking to ameliorate a statute which is final on its face but is unconstitutional. The Statute here arbitrarily and capriciously targets Vorhees, forcing him to sacrifice his legitimate rights upon an altar of practicality to eke out what benefit he can from that portion of his property remaining to him, if any, deemed outside the purview of the Statute. The subliminal suggestion inherent in the Seventh Circuit's and District Court's decisions is that Vorhees ought be prepared to endure the "taking" to which he has been

made subject and then plan around such so as to salvage something of the value of his land, albeit at the expense of incurring a substantial loss by his abandonment of his right to construct such buildings and roadways on his property as are essential to a realization of its full potential and the consequent economic gain as it would provide him. Any such thesis ought be considered untenable for the constitutional guarantees concerned are ones which ought not be diluted through the imposition of obstacles to the matter of their determination when realistically the action of the Illinois legislature is one which is final. This is especially the case when it is clear, as the situation here would seem to be, that a strained effort to pursue some sort of a process which obviously cannot and would not be an avenue to eliminate the prohibition mandated by the legislature but would only delay such at great cost to all involved and then in a circumstance where the process will have obscured rather than delineated the issue with the result that any ultimate review become far less subject to accurate perception. It is that with which Mrs. Suitum was confronted when the Tahoe Regional Planning Agency contrived an intricate process which only seemed to provide adequate relief from a taking of a type which this Court found to be unconstitutional in the course of its decision in *Lucas, supra*. This court without difficulty recognized the subterfuge and struck it down and said in such regard as follows:

> Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying Williamson County's requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel. *Suitum v. Tahoe Regional Planning Authority* __U.S.__, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997).

Similarly, the Illinois legislature has blatantly deprived Vorhees of a highly valuable use of his land by requiring him to in effect grant permanent easements for low level flights over large portions of it with the further consequence that he suffer great

damage to the remainder of his property through his being prevented by the prevalence of the Statute from pursuing a coherent plan for its integrated development as a whole. In fact all peripheral to those portions of his lands immediately impacted by the low overflights being protected will be seriously and adversely affected by the trespass being mandated. All of this most assuredly flies in the face of the Fifth and Fourteenth Amendment rights of Vorhees and most especially, as will be later denoted, of his right to equal protection of the laws. That this right of property be one which is clearly and recently held to be subject to such immunity is found in the course of this Court's decision in *Lucas*, wherein it was decided that compensation is required when there is an "invasion" of his land no matter how minute and no matter how weighty the public purpose behind it.

Just as the *Lucas* court did in substance deal with the ripeness issue and the *Suitum* court did eliminate a misapprehension as to the appropriate application of *Williamson*, it has again implicitly done this in the course of this Court's recent decision of *City of Chicago v. International College of Surgeons, et al.*, __U.S.__, 139 L.Ed. 2d 525, 118 S.Ct. 523 (1997). In that instance the City of Chicago limited through an ordinance which when implemented by a decision of its Commission effectively denied the International College of Surgeons a permit to demolish its property consisting of what was assertedly a residence having historical significance. An appeal to a trial court of general jurisdiction in Cook County was taken by that property owner. The matter was removed at the insistence of the City of Chicago to the Federal District Court which found the matter to be a federal question which justified that removal and susceptible to adjudication in that court. The Seventh Circuit reversed and was in turn reversed by this Court. Implicit to the decision was that there was a finality to the ruling of the Commission and that the matter was ripe for adjudication in the Federal District Court. In such regard this Court in significant part said, "a facial challenge to an allegedly unconstitutional.... zoning ordinance" is a claim "which we would assur-

edly not require to be brought in state courts." *City of Chicago, supra.* Ought not this Court take similar action in a situation where equally important rights are involved and if anything there be far less in the way of any ability to exhaust practically remedies upon the state level.

An additional reason for the consideration of this appeal is to resolve the dichotomy as to the views of the Ninth Circuit and the Seventh Circuit. The nature of this conflict is particularly delineated for the Ninth Circuit did hold that one aspect of a federal statute in the course of its opinion having to do with its decision in *Western Mining v. Watt*, 643 F.2d 618 (9th Cir. 1981), cert den. 454 U.S. 1031, 70 L.Ed. 2d. 474, 102 S.Ct. 567 This conflict is of particular significance for the Ninth Circuit Court of Appeals did hold that one aspect of a federal statute which it was called upon to interpret did not present a matter of actual controversy ripe for determination as there was authorized the issuance of regulations which had not as yet been promulgated while it recognized and proceeded to rule upon the constitutionality of that other portion of it with respect to which there was no provision for the issuance of regulations. Its reasoning was that the absence of discretion which was manifested thereby on the part of a cabinet officer did present an actual controversy ripe for its consideration. This position of the court was made clear and certain by its conclusion that the cabinet officer concerned was thereby deprived of discretion with regard to the enforcement of the latter statutory regulation and that thus the mere prevalence of it posed a sufficiently real and immediate threat of injury so as to give those questioning the legality of the statute to sue immediately. *Western Mining, supra,* at page 628. The essence of that fundamentally so determined by the Ninth Circuit is encapsulated in those words of it which follow:

> Unlike the other challenged provisions of the Act, the filing requirements of 1744 necessarily and of their own force apply to the individual plaintiffs here. Section 1744(c) leaves the Secretary no discretion, re-

> quiring that the claims be conclusively deemed abandoned when the filing provisions are not met...We believe that the allegations in this regard indicate a sufficiently real and immediate threat of injury to give rise to a justiciable, actual controversy, and present a sufficiently immediate threat of injury to the individual plaintiffs to give them standing to challenge these provisions. *Western Mining, supra* F at 628.

The situation presented to that Court and the ruling made by it is highly relevant to the quest of Vorhees that his cause be entertained by a federal district court apart from any administrative or judicial processes of the state level.

A further and compelling reason why this Court ought undertake the appeal of Vorhees is to avoid there remaining abroad an impression of the inference that federal district courts may not undertake the consideration of actions for declaratory judgments as to criminal statutes which are allegedly unconstitutional when it be clear, as is the case here, that the very prevalence of the Statute deters the execution of a fundamental constitutional right. District courts ordinarily and properly do and it is precisely that for which there is in place that portion of the federal code providing for such. Emblematic of that view is that done by this Court when in *Doe v. Bolton* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) said the following:

> ...We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a suf-

> ficiently direct threat of personal detriment. They should not be required to await and under a criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenridge*, 446 F.2d 833, 839-840 (CA6 1971); *Poe v. Menghini*, 339 F.Supp. 986, 990-991 (Kan. 1972). *Doe id* at U.S. 188.

Certainly an inference to the contrary with which there ought be concern would arise were this Court to allow to stand the implicit conclusion of the Seventh Circuit that the matter at issue be beyond the scope of the jurisdiction of federal courts upon a thesis that the *Williamson* ripeness doctrine is a bar thereto. The criminal statute with which Vorhees is confronted presents a classic example of the effective deprivation of a constitutional right when there be prevalent such a statute and this course be followed. Rather a prospective purchaser or lessee of the Vorhees property will react just as if the statute were valid and, practically speaking, Vorhees will never have the opportunity without first having incurred greater damage for the lengthy deprivation for the opportunity to have realized full benefit from the property. In fact, he will never get the opportunity to build a structure to test the validity of the statute in that manner for those at the local level who charged with issuing building permits for all buildings will necessarily be governed by statute. And their denial to him of building permits will have a nebulous basis unsuitable for any court to focus upon while the statute itself presents the issue of finality. This court has reflected that thinking in the course of its decision in *Doe id.*

II

The court ought grant the petition for writ of certiorari so as to provide a standard for the distinction between takings which are licit upon the payment of compensation and those which are *per se* a denial of due process of law and the equal protection of it in that there be as is here an arbitrary and capricious deprivation by governmental action of a property right to serve a private purpose

The essence of the important constitutional considerations as contained in the Fifth and Fourteenth Amendments is encompassed when this Court said in the course of its determination of *Lucas, supra*, "a state by *ipse dixit* may not transform private property into public property without compensation." S.Ct.Id at 2901. Certainly, it is more egregious when the taking is unabashedly one to serve the wholly private purposes of a small group as to their exercise of their hobby of flight in small aircraft and the engine selected therefor to the arbitrary and capricious targeting of the property right of individual citizens. It is therefore difficult under the circumstances to imagine that there be any validity to the pronouncement on the part of the Seventh Circuit that there be a public interest arising sufficient to justify a taking having to do with public purpose and thereby the eligibility of Vorhees to realize compensation at the state level upon an inverse condemnation thesis. There would seem to be no point of distinction because of the involvement of private aircraft as contrasted to automobiles, nor it would seem that anyone would infer that the State's interest in the movement of traffic would justify the provision by the State of an easement over person's property to allow his neighbor to achieve more convenient access to his garage. This is a viewpoint to which the Seventh Circuit has itself subscribed in no uncertain terms for in the course of its holding in *Gamble v. Eau Claire County* 5 F.3d 285 (7th Cir. 1993) it did state as follows:

> The plaintiff's claim that she was denied substantial due process is different...Her complaint is not that she was denied an award to which state law entitled her provided she complied with the state's procedures, but that she is entitled to get her land back or its full pecuniary equivalent. *Signal Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1404-05 (9th Cir. 1989)...
>
> This approach has its greatest appeal when the state acts outside its eminent domain powers, for example by taking property for a private rather than for a

> public use. Suppose a state passed a law which said that the governor could take away a person's home and give it to his brother-in-law. It could be argued that such a law, even if meticulously enforced in accordance with the requirements of due process in the sense of fair procedure, would, if the law were as arbitrary and unreasonable as it seemed, deprive the homeowner of property without due process of law. Statutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the public interest, are held to violate due process even if there is no procedural irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause. *Penal v. City of San Jose*, 485 U.S. 1, 11, 99 L. Ed. 2d 1, 108 S. CT. 849 (1988); *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1343 (7th Cir. 1992). When land is taken for a private rather than public use, a rational basis for the government's action, it may be argued, is lacking. *Gamble Id* at 285-86. (Emphasis supplied)

This is even more puzzling when it be considered that the Seventh Circuit has recognized the parochial nature of the private legislation involved. In its opinion the Seventh Circuit makes reference to the legislative history of that to which Vorhees has registered his complaint. Such is found in the body of its opinion and is supplemented by a footnote thereto. The former is as follows:

> In fact, Illinois State Rep. Cowlishaw of Naperville specifically stipulated that the legislation "applies to only three very small privately owned airports in Illinois." 87th Gen. Assm. 40th Leg.Day May 12,1989. (Emphasis supplied) App. A at 3.

The latter is a more lengthy excerpt from the legislative history of the statute at issue and is as follows:

> "[The legislation] is intended to apply now to these three airports, to protect them from hazards built within the area that they need in order to take off and land, so that your airport at Sandwich or wherever it is, would be protected from that kind of urban sprawl and from the fact that you have people there who have used these airports for years and who certainly don't want a five story apartment building built at the end of the runway." App. A at 3.

CONCLUSION

The legislature of Illinois has made a final and definitive determination forbidding Vorhees to do that which is fundamental to the use of his property and permitting serious invasions into it to his great damage. The gravity of that done is made apparent by the criminal nature of the statute involved and the serious penalties that would apply to him upon its violation—something which is especially relevant in that he is the target of the private legislation in question. This court's decision in *Lucas v. South Carolina Coastal Council, supra* affirmed that when there are regulations "...that compel the property owner to suffer a physical 'invasion' of his property...no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." The Lucas court classified such as a "categorical" violation of the takings clause. *Lucas id* S.Ct. at 2893.

Despite the finality of the Illinois legislature's action prohibiting Vorhees from constructing upon his property much of that which is significant to the practical use of it, the Seventh Circuit ruled that his "takings claim" was not ripe for adjudication and refused to allow there to be considered the merit of the facial unconstitutionality of the statute concerned as one which not only effects an illicit taking but does so in denial to Vorhees of his

property apart from due process of law and the equal protection of such as is guaranteed to him by the Fifth and Fourteenth Amendments of the Constitution of the United States.

The confusion induced by the Seventh Circuit's erroneous application of the *Williamson* ripeness doctrine, if allowed to persist, will continue to inspire legislatures and regulatory bodies to enact cavalierly statutes and promulgate regulations which are knowingly unconstitutional in reliance upon there being imposed upon those who are the objects of such overreachings an endless labyrinth of useless processes. But more importantly the Circuit Court opinion justifying the District Court's refusal to consider the Vorhees complaint as a ripe constitutional claim vitiates the *Lucas* decision and is in derogation of this Court's recent decisions in *Suitum* and *International College of Surgeons*. Moreover, it is in conflict with the Ninth Circuit. Whether a state can by legislative fiat take from one person and transfer to a small group of persons for private purpose an important property right which he has to that superadjacent to his property as established in *Causby* is a seminal question that is determinative of whether a property owner can have his constitutional rights to real property protected in a federal judicial forum. Petitioner respectfully urges this Court to grant his petition for writ of certiorari to decide this important issue and resolve the Circuit conflict.

DATED: June 1998

Respectfully submitted,

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APPENDIX A

No. 96-4109

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLES M. VORHEES, as Executor of the Last Will and Testament of HELEN V. BRACH, a person presumed dead, Plaintiff-Appellant,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation, COUNTY OF DUPAGE, a political subdivision of the State of Illinois, CITY OF NAPERVILLE, a municipality organized under the laws of the State of Illinois, et al., Defendants-Appellees.

1998 U.S. App. LEXIS 1728

May 28, 1997, Argued

February 4, 1998, Decided

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY. Reported in Table Case Format at: 1998 U.S. App. LEXIS 4900.

Rehearing Denied March 19, 1998, Reported at: 1998 U.S. App. LEXIS 6152.

PRIOR HISTORY. Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 3812. Blanche M. Manning, Judge.

DISPOSITION: AFFIRMED.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. JOHN L. COFFEY, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION: ORDER

On June 30, 1995, Charles M. Vorhees ("Vorhees"), executor of the estate of Helen Brach, filed suit in the United States District Court for the Northern District of Illinois. Vorhees sought declaratory and injunctive relief under 28 U.S. C. §2201, claiming that section 49.1 of the Illinois Aeronautics Act is "repugnant to the concepts of the Fifth Amendment to the Constitution of the United States and thereby and otherwise violative of the Fourteenth Amendment of it." The named defendants included Kirk Brown, Secretary of the Illinois Department of Transportation ("IDOT"); William L. Blake, Director of the IDOT Division of Aeronautics; the County of DuPage, Illinois; the City of Aurora, Illinois; the City of Naperville, Illinois; and the Naper Aero Club.

The defendants, citing a lack of subject matter jurisdiction, moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(1). They argued that Vorhees' complaint did not satisfy the "case and controversy" requirement of Article III, section two, of the United States Constitution. The district court granted the motion with prejudice. Vorhees filed for appeal on December 11, 1996, and we affirm.

BACKGROUND

The Brach estate holds an undivided, one-half interest in a 312-acre farm located in unincorporated DuPage County. The property is devoted to traditional farm uses, and is contiguous with the cities of Naperville and Aurora. Naperville has a reserved right to annex the eastern half of the property, while Aurora has a re-

served right to the western half. The area surrounding the farm has been subject to significant recent development.

In 1956, a private airport was built adjacent to the farm. The airport's runway has its northern end abutting the southern boundary of the farm. Today, the airport is operated by the Naper Aero Club for the private use of the Club's members. Due to the proximity of the runway to the farmland, aircraft taking off from and landing at the airport necessarily traverse the farm at low altitude.

In 1989, attempting to prevent developers from constructing tall structures near airport runways that would interfere with aircraft flight paths, the Illinois legislature enacted an amendment to the Illinois Aeronautics Act which provided that "no person may create or construct any airport hazard which obstructs a restricted landing area or residential airport..." 620 I.L.C.S. 5/49. 1. This particular piece of legislation was specifically drafted and adopted to deal with only three airports: the Naper Aero Club airport, a second airport located south of the town of Elgin in Kane County, and a third airport south of the town of Downers Grove in DuPage County. In fact, Illinois State Rep. Cowlishaw of Naperville specifically stipulated that the legislation "applies to only three very small privately owned airports in Illinois." 86th Gen. Assm. 40th Leg. Day May 12, 1989.[1]

Vorhees filed suit in 1995, seeking declaratory judgment in arguing that the statute in question was a "taking." Citing no "case or controversy," the district court dismissed, and Vorhees appeals.

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[1] Cowlishaw continues: "[The legislation] is intended to apply now to these three airports, to protect them from having hazards built within the area that they need in order to take off and land, so that your airport at Sandwich or wherever it is, would be protected from that kind of urban sprawl and from the fact that you have people there who have used these airports for years and who certainly don't want a five story apartment building built at the end of the runway." Id.

DISCUSSION

This Court reviews motions to dismiss for lack of jurisdiction over the subject matter de novo. *Deveraux v. City of Chicago,* 14 F.3d 328, 330 (7th Cir 1994). Facts and inferences are to be drawn in a light most favorable to the plaintiff. *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 178-179 (7th Cir 1996).

The sole issue for consideration here is whether the plaintiff has established that his claim is sufficiently ripe for adjudication to satisfy the case and controversy requirement set forth in Article III, section two, of the United States Constitution. In general, in order for a dispute to be ripe for adjudication, "the controversy must be definite and concrete, touching the legal relations of parties having adverse interests. [citations omitted]. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *Deveraux,* 14 F.3d at 331 (quoting *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-241, 57 S. Ct. 461, 463-464, 81 L Ed. 617 (1937)). If a case is not ripe for adjudication under Article III of the United States Constitution, federal courts lack subject matter jurisdiction over the case. *Biddison v. City of Chicago,* 921 F.2d 724, 726 (7th Cir 1991). In reviewing Vorhees' claim, the district court found that:

Those who seek to invoke injunctive relief must satisfy the jurisdictional requirement of the federal courts by alleging an "actual case or controversy." . . . We find this area of the law to be clear. That is, regardless of whether this court has subject matter jurisdiction over plaintiffs claims, in the absence of an "actual, ongoing case or controversy", this court's jurisdiction does not extend to equitable relief claims.

On appeal, the plaintiff argues that:

> Illinois may not constitutionally deprive him . . . of any part of that superadjacent to [his] land[] which [is] sus-

> ceptible to use. Particular emphasis is given to the fact that the taking concerned is solely for the private usage of those privileged members of the Club and others having to do with their recreational hobby of flying small aircraft. Such constitutes a violation of Vorhees' . . . Fifth and Fourteenth Amendment rights which by virtue of the premises is beyond cure other than through an invalidation of that statute of Illinois directed to such purpose. The harm done thereby is immediate and such cannot be ameliorated by speculation that somehow such may be proved to be less than that which would totally destroy the ability to utilize all of the property.

The Supreme Court's reasoning in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), is particularly relevant in this case. In Williamson, a real estate developer brought suit against a zoning commission, alleging that the commission had deprived the developer of its property without just compensation. 473 U.S. at 182-183, 105 S. Ct. at 3114-3115. The Court established a two-part test to determine when a takings claim is ripe for federal adjudication. Specifically, "a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186, 105 S. Ct. at 3116. In Williamson, because the respondent had not obtained a "final decision regarding the application of the zoning ordinance and subdivision regulations to its property, . . . respondent's claim is not ripe." Id.[2] The second

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[2] The Supreme Court explained the rationale for this rule as follows: "Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although the question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, . . . this Court consistently has indicated that among the

part of the Williamson test requires that a property owner "seek compensation through the procedures the State has provided for doing so." 473 U.S. at 194, 105 S. Ct. at 3120. "If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195, 105 S. Ct. at 3121.

With respect to the first requirement of the Williamson standard, this Court in *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d at 179 (quoting *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir 1988), cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 216 (1988)), held that "[a] plaintiff must demonstrate a final decision on a 'development plan submitted, considered, and rejected by the governmental entity.'" Covington submitted a development plan to the Oak Brook Board of Trustees for approval. The Trustees failed to vote on the submitted plan, giving rise to Covington's suit. We held that Covington should have sought a writ of mandamus from the state court to compel the vote. "We have frequently reminded litigants that federal courts are not boards of zoning appeals." Id. Thus, until the aggrieved party has obtained a final decision regarding the application of a regulation to property at issue, there is no reason for federal courts to intervene.

In the case before us, Vorhees has to date not been denied any property. There is no allegation that the plaintiff has a concrete

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factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 190-191, 105 S. Ct. at 3118-3119 (citations and internal quotation marks omitted).

plan in mind which he has presented to governmental officials, and that this plan has been finally and authoritatively rejected. Vorhees' property has not been limited in any way by Aurora, Naperville, DuPage County, the Naper Aero Club, or the Illinois Department of Transportation. Even if Vorhees had submitted such a development plan, local authorities, both at the municipal and state levels, should be given an opportunity to address this issue themselves. Should they pass on this opportunity, redress should be sought in state court rather than federal court. See generally *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir 1994). This question does not belong in federal court at this juncture in the proceedings.

The second Williamson requirement calls for us to determine what procedures and remedies are available to Vorhees at the state level. In *Hager v. City of West Peoria,* 84 F.3d 865 (7th Cir 1996), the plaintiffs alleged that city ordinances that limited vehicle access to the plaintiffs' businesses resulted in a taking of property and violated Constitutional rights to equal protection. We held:

Illinois law provides a judicially-created remedy of inverse condemnation for property owners aggrieved by municipal legislation. Plaintiff admits this. This admission acknowledges that federal court is not the proper venue for plaintiffs' takings claims. Only upon completion of existing state procedures and denial of just compensation may plaintiffs properly claim a taking without just compensation in federal court.

Id. at 869. See *Biddison*, 921 F.2d at 727 (Illinois provides an inverse condemnation action for property owners who are harmed by the government's actions; plaintiffs claim was not ripe because he had failed to utilize available remedies).

Vorhees has failed to commence inverse condemnation proceedings in Illinois, and writes them off as incapable of providing

him with remedy.[3] This is simply not true. The Illinois constitution provides that "private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." 1 Ill. Const. 1970 §15. Illinois courts have held that this provision is self-executing and provides a remedy to aggrieved property owners. *Hoekstra v. County of Kankakee,* 48 Ill. App. 3d 1059, 365 N.E.2d 553, 8 Ill Dec. 315 (Ill. App. Ct. 1977). Additionally, the Illinois General Assembly may not place a taking beyond the reach of the courts - state courts must have jurisdiction to review a legislative taking of property to verify that it was for a public use consistent with the Illinois constitution. *Poole v. City of Kankakee,* 406 Ill. 521, 94 N.E.2d 416 (Ill. 1950).

Thus, under this Court's well-founded precedent, the plaintiff-appellant Vorhees has failed to produce a scintilla of evidence demonstrating that his claim is ripe for adjudication in the federal courts as a "case or controversy."

Turning to two other points raised by the plaintiff, Vorhees wrongly claims that Illinois statutory construction has prohibited him from improving his property, and thereby "deprived him of a substantial interest in his property and constitutes a denial to him of due process of law and the equal protection of it..." We recognize the fact that many plaintiffs who either bring takings claims to federal court and argue that state regulations are takings per se or attempt to circumvent state remedial procedures as dictated in Williamson will claim that the regulation in question violates their constitutional due process rights. See *Gosnell v. City of Troy,* 59 F.3d 654 (7th Cir 1995); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573 (7th Cir 1990). A violation of constitutional rights is a federal question and does not require parties to exhaust state remedies. *Steffel v. Thompson,* 415 U. S. 452, 472-473, 94 S. Ct. 1209, 1222, 39 L Ed. 2d 505 (1974). Nonetheless, we have

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[3] Vorhees specifically characterizes the pursuit of administrative remedies and litigation as "an exercise in futility."

consistently held that substantive due process considerations do not automatically provide federal courts jurisdiction to consider takings claims-plaintiffs are encouraged to seek their remedy in state court first. *Gamble v. Eau Claire County*, 5 F.3d 285, 287-288 (7th Cir 1993). Additionally, substantive due process claims usually arise in situations where the Government goes beyond its prescribed power of eminent domain (i.e., where property is taken for a private use, rather than a public use). *Id.* at 287.

Vorhees attempts to argue that the Brach farm was being regulated for a private use because the regulation only benefited a residential airport that was maintained for the exclusive use of members of the Naper Aero Club. We are of the opinion, however, that a strong public interest exists in upholding access to private aviation. There is no evidence before us to support the conclusion that any individual seeking to fly their own aircraft would be denied admission to the Naper Club. The Club serves the public interest by providing facilities for individuals who want to fly aircraft of their own.

Finally, the defendant attempts to argue that under takings precedent, he is nonetheless entitled to compensation. His reliance on the Supreme Court's takings analysis, however, puts him, for the purpose of argument, a step ahead of where he should be. As we have previously made clear, before he can bring a takings claim, Vorhees must suffer a taking. Since no taking has yet occurred here, this court need not concern itself with Vorhees' right to just compensation. *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116 ("a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

AFFIRMED.

APPENDIX B

No. 96-4109

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLES M. VORHEES, as Executor of the Last Will and Testament of HELEN V. BRACH, a person presumed dead, Plaintiff-Appellant,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation, COUNTY OF DUPAGE, a political subdivision of the State of Illinois, CITY OF NAPERVILLE, a municipality organized under the laws of the State of Illinois, et al., Defendants-Appellees.

134 F.3d 375; 1998 U.S. App. LEXIS 4900

May 28, 1997, Argued

February 4, 1998, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY. Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 3812. Blanche M. Manning, Judge.

Reported in Full-Text Format at: 1998 U.S. App. LEXIS 1728.

OPINION: AFFIRMED.

APPENDIX C

No. 95 cv 3812

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES M. VORHEES, as Executor of the Last Will and Testament of Helen V. Brach, a person presumed dead, Plaintiff,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation; WILLIAM L. BLAKE, Director of the Division of Aeronautics of the Department of Transportation; COUNTY OF DUPAGE, a political subdivision of the State of Illinois; CITY OF NAPERVILLE, a municipality organized under the laws of the State of Illinois; CITY OF AURORA, a municipality organized under the laws of the State of Illinois; NAPER AERO CLUB, INC., an Illinois Not-For-Profit Corporation; and the HAZEL S. BRODIE TRUST, Defendants.

1996 U.S. Dist. LEXIS 14282

September 20, 1996, Decided

September 27, 1996, DOCKETED

COUNSEL: For CHARLES M. VORHEES, as Executor of the last will and testament of Helen V. Brach, a person presumed dead est Helen V. Brach, executor plaintiff: Edward V Donovan, Jr., Saulius V. Kuprys, James Joseph McManus, Henehan, Donovan & Isaacson, Ltd., Chicago, IL.

For KIRK BROWN, Secretary of the Illinois Department of Transportation, WILLIAM L. BLAKE, Director of the Division of Aeronautics of the Department of Transportation, defendants: Thomas A. Ioppolo, Jonathan Clark Green, Illinois Attorney Gen-

eral's Office, Chicago, IL. For COUNTY OF DUPAGE, THE, a political subdivision of the State of Illinois, defendant: Nancy J. Wolfe, DuPage County State's Attorney's Office, Wheaton, IL. Kimberly S. Rich, DuPage County State's Attorney's Office, Wheaton, IL. For CITY OF AURORA, a municipality organized under the laws of the State of Illinois, defendant: Michael B. Weinstein, City of Aurora, Department of Law, Aurora, IL. For NAPER AERO CLUB INC., an Illinois not-for-profit corporation, defendant: Leigh R. Pietsch, Pietsch, Cuchna, Popejoy & Whelan, Wheaton, IL. Timothy P. Whelan, Law Offices of Timothy P. Whelan, P.C., Wheaton, IL. For HAZEL S. BRODIE TRUST, defendant: Gregory H. Furda, Sidley & Austin, Chicago, IL.

JUDGES: Blanche M. Manning, United States District Court

OPINION BY. Blanche M. Manning

OPINION: MEMORANDUM AND ORDER

This matter comes before the court on the motions of several defendants. KIRK BROWN, Illinois Secretary of Transportation and WILLIAM L. BLAKE, Director of Aeronautics of the Illinois Department of Transportation to dismiss plaintiff's complaint pursuant to 12(b)(1) and 12(b)(6) of the federal rules of civil procedure. Defendant CITY OF AURORA requests that this court dismiss plaintiff's complaint pursuant to 12(b)(1). Defendant NAPER AERO CLUB, INC. requests that this court dismiss plaintiff's complaint with prejudice pursuant to 12(b)(1). Last, Defendants COUNTY OF DUPAGE request that this court dismiss plaintiff's complaint pursuant to 12(b)(1).

Plaintiff is requesting permanent injunctive relief against defendants to prevent them from enforcing Section 49.1 of the Illinois Aeronautics Act. 620 ILCS 5/49.1 (1990). Plaintiff claims that section 49.1 of the Illinois Aeronautics Act has erected substantial barriers to the development and improvement of his property, which takes away from his ability to fully use and enjoy his land. Plaintiff claims that Section 49.1 is repugnant to the Fifth

and Fourteenth Amendments to the United States Constitution and requests relief pursuant to the Federal Declaratory Judgment Act, 28 U.S. C. Section 2201.

Reviewing the pleadings of these respective defendants, we find they have essentially raised the similar argument raised by the City of Naperville in its motion to dismiss. Brown and Blake assert that the case is not ripe for adjudication, and therefore this court lacks subject matter jurisdiction. *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 87 L Ed. 2d 126, 105 S. Ct. 3108 (1985); *Agins v. Tiburon,* 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). The City of Aurora asserts that this case neither presents an actual "case or controversy" nor are plaintiffs claims "ripe for judicial review" and requests that this court review the arguments asserted by the co-defendants City of Naperville. Defendants Naper Aero Club, Inc. and County of DuPage both rely on the United States Supreme Court case of *Agins v. Tiburon,* 447 U.S. 255, 65 L Ed. 2d 106, 100 S. Ct. 2138 (1980), asserting that this court has not yet been presented with a justiciable controversy for the purposes of Article III.

On March 25, 1996, we granted the City of Naperville's motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure rule 12(b)(1), because we found that plaintiff had not satisfied the jurisdictional requirements of the court. We found plaintiff's alleged cause of action was not ripe for adjudication. Those who seek to invoke injunctive relief must satisfy the jurisdictional requirement of the federal courts by alleging an "actual case or controversy." *Flast v. Cohen,* 392 U.S. 83, 94 - 101, 88 S. Ct. 1942, 1949-1953, 20 L. Ed. 2d 947 (1968). A federal court's jurisdiction over those claims which seek equitable relief extends only to "actual, ongoing cases or controversies." *Lewis v. Continental Bank,* 494 U.S. 472, 108 L. Ed. 2d 400, 110 S.Ct. 1249 (1990).

We find this area of the law to be clear. That is, regardless of whether this court has subject matter jurisdiction over plaintiff's claims, in the absence of an "actual, ongoing case or controversy," this court's jurisdiction does not extend to equitable relief claims. Id.

Our review of plaintiff's complaint leads us to conclude there is sufficient speculation on plaintiff's part determining the ultimate acts of defendants in this case. Until the plaintiff can allege specific acts which support a plan or until plaintiff obtains a final, definite decision from the local or state authorities which forbids the proposed development of the land, he has not alleged an actual case or controversy before this court.

Plaintiffs instead assert that an exhaustion of administrative remedies is not necessary. In their surreply memorandum addressing defendants Kirk Brown and William L. Blake's motion to dismiss, plaintiffs assert *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L Ed. 2d 798 (1992) in support of their position. Although their argument is difficult to decipher, it appears that plaintiffs are alleging that a legislative act's dramatic effect on the economic value of private property constitutes taking which requires 'just compensation,' regardless if administrative remedies are exhausted. *Lucas,* 505 U.S. at 1006. Yet, the Lucas decision must be distinguished in that it has limited applicability to the case at bar.

In Lucas, petitioner paid approximately one million dollars for property located in South Carolina in 1986 which he intended to use for single-family homes. *Lucas,* 505 U.S. at 1006. In 1988, the South Carolina legislature enacted the Beachfront Management Act which directly barred petitioner from erecting any permanent habitable structures on his two parcels. *Lucas,* 505 U.S. at 1006. In essence, the Beachfront Management Act brought Lucas's plans to an abrupt end. *Lucas,* 505 U.S. at 1006. Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction ban effected a taking

of his property without just compensation. *Lucas,* 505 U.S. at 1006 The trial court found that the Beachfront Management Act decreed a permanent ban on construction as far as Lucas's lots were concerned, depriving Lucas of any reasonable economic use of the lots, which rendered them valueless. *Lucas,* 505 U.S. at 1009. The South Carolina Supreme Court reversed the trial court, finding that new construction in the coastal zone, as petitioner intended, threatened the public resource. *Lucas,* 505 U.S. at 1003. Thus, the Supreme Court found no compensation owing under the Takings clause, regardless of the regulation's effect on the property's value. *Lucas,* 505 U.S. at 1003. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of the court's opinion, the Act was amended to authorize the council to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. *Lucas,* 505 U.S. at 1009.

Because petitioner Lucas had not obtained a final decision regarding how he would be allowed to develop his property, the defendants argued that he was not yet entitled to definitive adjudication of his takings claim in the United States Supreme Court. *Lucas,* 505 U.S. at 1009. Yet, the Supreme Court dismissed this argument finding that these considerations would have precluded review had the South Carolina Supreme Court rested its judgment on ripeness grounds. *Lucas,* 505 U.S. at 1011. The South Carolina Supreme Court preferred to dispose of Lucas's takings claim on its merits, rather than addressing the possibility of further administrative and trial proceedings. *Lucas,* 505 U.S. at 1011.

The United States Supreme Court responded with the following:

> In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late created "special-permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury in fact in this case, with respect to both the pre-1990

> and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act. That there is a discretionary "special permit" procedure by which he may regain-for the future at least-beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. *Lucas,* 505 U.S. at 1011.

This detail is necessary for us to lay sufficient ground work to conclude that indeed Lucas is a different animal than the case presently before us. The legislation in Lucas was enacted, it did affect the petitioner and did transform the essential use and desire he had for the land. Plaintiff's attempts in this case to analogize Lucas to this case are in error as plaintiff has failed to raise more than speculation regarding the defendants' activities and their ultimate effect on his land. In other words, plaintiff has failed to allege an actual case or controversy before this court.

Therefore, defendant BROWN and BLAKE's motion to dismiss will be granted pursuant to 12(b)(1) with prejudice. This found, we find no need to address defendants' 12(b)(6) aspect of their motion at this time. Defendant CITY OF AURORA's motion to dismiss will also be granted pursuant to 12(b)(1) with prejudice. Defendant NAPER AERO CLUB, INC's motion to dismiss pursuant to 12(b)(1) will be granted with prejudice. Last, defendant COUNTY OF DUPAGE's motion to dismiss pursuant to 12(b)(1) will also be granted with prejudice.

DATE: SEP 20 1996

Blanche M. Manning

United States District Court

APPENDIX D

NO. 95 cv 3812

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHARLES M. VORHEES, as Executor of the Last Will and Testament of Helen V. Brach, a person presumed dead, Plaintiff,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation; WILLIAM BLAKE, Director of the Division of Aeronautics of the Department of Transportation; COUNTY OF DUPAGE, a political subdivision of the State of Illinois; CITY OF AURORA, a municipality organized under the laws of the State of Illinois; NAPER AERO CLUB, INC., an Illinois Not-For-Profit Corporation; and the HAZEL S. BRODIE TRUST, Defendants.

1996 U.S. Dist. LEXIS 3637

March 25, 1996, DATE

March 26, 1996, DOCKETED

COUNSEL: For CHARLES M VORHEES, as Executor of the last will and testament of Helen V. Brach, a person presumed dead est Helen V Brach, executor plaintiff. Edward V. Donovan, Jr., [COR LD NTC A], Saulius V. Kuprys, [COR], James Joseph McManus, [COR], Henehan, Donovan & Isaacson, Ltd., Chicago, IL.

For KIRK BROWN, Secretary of the Illinois Department of Transportation, WILLIAM L BLAKE, Director of the Division of Aeronautics of the Department of Transportation, defendants: Thomas A. Ioppolo, [COR], Jonathan Clark Green, [COR LD

NTC A], Illinois Attorney General's Office, Chicago, IL. For COUNTY OF DUPAGE, THE, a political subdivision of the State of Illinois, defendant: Nancy J. Wolfe, [COR LD NTC], DuPage County State's Attorney's Office, Wheaton, IL. Kimberly Soo Rich, [COR], DuPage County State's Attorney's Office, Wheaton, IL. For CITY OF NAPERVILLE, a municipality organized under the laws of the State of Illinois, defendant: Michael M. Roth, [COR LD NTC Al, Howard P. Levine, [COR], Paul L. Stephanides, [COR], City of Naperville, Naperville, EL. For CITY OF AURORA, a municipality organized under the laws of the State of Illinois, defendant: Michael B. Weinstein, [COR LD NTC A], City of Aurora, Department of Law, Aurora, IL. For NAPER AERO CLUB INC, an Illinois not-for-profit corporation, defendant: Leigh R. Pietsch, [COR], Pietsch, Cuchna, Popejoy & Whelan, Wheaton, IL. Timothy P. Whelan, [COR LD NTC Al, Law Offices of Timothy P. Whelan, P.C., Wheaton, IL. For HAZEL S. BRODIE TRUST, defendant: Gregory H. Furda, [COR LD NTC A], Sidley & Austin, Chicago, IL.

JUDGES: Blanche M. Manning, United States District Court

OPINION BY. Blanche M. Manning

OPINION: MEMORANDUM AND ORDER

This matter comes before the court on the motion of defendant Naperville to dismiss plaintiffs complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). Plaintiff is requesting permanent injunctive relief against all defendants to prevent them from enforcing Section 49.1 of the Illinois Aeronautics Act. 620 ILCS 5/49.1 (1990). Plaintiff claims that section 49.1 of the Illinois Aeronautics Act has erected substantial barriers to the development and improvement of his property which takes away from his ability to fully use and enjoy his land. Plaintiff claims Section 49.1 is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution and requests relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. Section 2201.

For the reasons stated below, we grant defendant City of Naperville's motion to dismiss.

Federal Question Jurisdiction under 28 U.S.C. Section 1331.

Before a district court entertains a claim for recovery under the Constitution or federal statutes, it must conduct an initial review of the face of the complaint to determine whether the merits are sufficiently substantial to engage the subject matter jurisdiction of the court. See e.g., *Ricketts v. Midwest Nat'l Bank,* 874 F.2d 1177, 1180-82 (7th Cir 1989). If the court determines the claim is "wholly insubstantial and frivolous," the court does not have the power to decide the case and the complaint must be dismissed for lack of subject matter jurisdiction. *Ricketts,* 874 F.2d at 1182, see also *Joyce v. Joyce,* 975 F.2d 379, 383 (7th Cir 1992).

This circuit adheres to the "well-pleaded complaint" doctrine. Under this doctrine, federal law must create the cause of action, or some substantial, disputed question of federal law must be an element in the plaintiff's claim. *Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc.,* 984 F.2d 821, 822 (7th Cir 1993) citing *Franchise Tax Bd v. California Laborers Vacation Trust,* 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2855-56, 77L Ed. 2d 420 (1983). Federal question jurisdiction exists so long as "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law." *Franchise Tax Bd.,* 463 U.S. at 13 (1983).

Here, plaintiffs complaint is essentially a claim for declaratory relief pursuant to 28 U.S.C. Section 2201. Plaintiff is seeking judgment that Section 49.1 of the Illinois Aeronautics Act is unconstitutional. We can conclude that from the complaint plaintiff's claim arises from federal law.

Therefore, we find this court has subject matter jurisdiction over plaintiffs' claims for declaratory relief pursuant to 28 U.S.C.

Section 1331. However, this does not end the inquiry for the purposes of defendant's motion to dismiss.

Those who seek to invoke injunctive relief must satisfy the jurisdictional requirement of the federal courts imposed by Article III by alleging an "actual case or controversy". *Flast v. Cohen,* 392 U.S. 83, 94-101, 88 S. Ct. 1942, 1949-1953, 20 L Ed. 2d 947 (1968); *Jenkins v. McKeithen,* 395 U.S. 411, 421-425, 89 S. Ct. 1843, 1848-50, 23 L Ed. 2d 404 (1969).

A federal court's jurisdiction over those claims which seek equitable relief extends only to "actual, ongoing cases or controversies." *Lewis v. Continental Bank,* 494 U.S. 472, 108 L Ed. 2d 400, 110 S. Ct. 1249 (1990).

To establish a "case or controversy" for Article III purposes, plaintiffs must demonstrate a "personal stake in the outcome" in order to assure that constitutional issues presented to the court will properly be resolved. *Baker v. Carr,* 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L Ed. 2d 663 (1962). It is not enough for the plaintiff to abstractly show injury. See, e.g., *Golden v. Zwickler,* 394 U.S. 103, 109-110, 89 S. Ct. 956, 960, 22 L. Ed. 2d 113 (1969); *United Public Workers v. Mitchell,* 330 U.S. 75, 89-91, 67 S. Ct. 556, 91 L Ed. 754 (1947). The basic tenets of equitable relief require the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. See *O'Shea v. Littleton,* 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974), vacated *Spomer v. Littleton,* 414 U.S. 514, 94 S. Ct. 685, 38 L. Ed. 2d 694 (1974).

Upon review of plaintiff's complaint, we find that there are no allegations that plaintiff ever submitted plans, designs, drawings, formally qr informally to the City of Naperville for the development of the subject property that was impacted by the Act. Further, there are no allegations that Naperville states any specific intent to impose the Act on any development plans for the subject property. There is no actual case or controversy before this court.

Therefore, defendant City of Naperville's motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) is granted with prejudice.

Blanche M. Manning

United States District Court

DATE: 3-25-96

APPENDIX E

No. 96-4109

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLES M. VORHEES, as Executor of the Last Will and Testament of Helen V. Brach, a person presumed dead, Plaintiff-Appellant,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation; WILLIAM BLAKE, Director of the Division of Aeronautics of the Department of Transportation; COUNTY OF DUPAGE, a political subdivision of the State of Illinois; CITY OF AURORA, a municipality organized under the laws of the State of Illinois; NAPER AERO CLUB, INC., an Illinois Not-For-Profit Corporation; and the HAZEL S. BRODIE TRUST, Defendants-Appellees.

1998 U.S. App. LEXIS 6152

March 19, 1998, Decided

PRIOR HISTORY:
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 3812. Blanche M. Manning, Judge.

Original Opinion of February 4, 1998, Reported at: 1998 U.S. App. LEXIS 1728.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. JOHN L. COFFEY, Circuit Judge, Hon. KENNETH F RIPPLE, Circuit Judge.

OPINION: AMENDED ORDER
On consideration of the petition for rehearing and suggestion for rehearing en banc* I filed in the above-entitled case on February

18, 1998, by Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

*Honorable Walter J. Cummings took no part in the decision of this petition for rehearing.

APPENDIX F

No. 96-4109

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLES M. VORHEES, as Executor of the Last Will and Testament of Helen V. Brach, a person presumed dead, Plaintiff-Appellant,

v.

KIRK BROWN, Secretary of the Illinois Department of Transportation; WILLIAM BLAKE, Director of the Division of Aeronautics of the Department of Transportation; COUNTY OF DUPAGE, a political subdivision of the State of Illinois; CITY OF AURORA, a municipality organized under the laws of the State of Illinois; NAPER AERO CLUB, INC., an Illinois Not-For-Profit Corporation; and the HAZEL S. BRODIE TRUST, Defendants-Appellees.

1998 U.S. App. LEXIS 6152

March 17, 1998, Decided

PRIOR HISTORY:
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 3812. Blanche M. Manning, Judge.

Original Opinion of February 4, 1998, Reported at: 1998 U.S. App. LEXIS 1728.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. JOHN L. COFFEY, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION: ORDER
On consideration of the petition for rehearing and suggestion for rehearing en banc I filed in the above-entitled case on February

18, 1998, by Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX G

STATUTES CITED

620 ILCS 5/22. Airport hazard defined

§ 22 . "Airport hazard" means any structure, object of natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or restricted landing area or is otherwise hazardous to such landing or taking off.

620 ILCS 5/33. Enforcement of aeronautics laws

§ 33. Enforcement of aeronautics laws. It shall be the duty of the Department, its officers, and such of its employees as are designated by it to do so, to enforce and assist in the enforcement of all laws of this State pertaining to aeronautics, and of all rules, rulings, regulations, orders and decisions issued by the Department pursuant thereto, and in aid of such enforcement, general police powers are hereby conferred upon the Department, each of its officers, and such of its employees as are designated by it to exercise such powers. It shall also be the duty of every State, county and municipal officer charged with the enforcement of State and municipal laws to enforce and assist in the enforcement of all laws of this State pertaining to aeronautics.

620 ILCS 5/49. 1. Creation of hazards

§ 49. 1. Creation of Hazards. No person may create or construct any airport hazard which obstructs a restricted landing area or residential airport that (1) serves 20 or more based aircraft, and (2) is located within the "metropolitan region" as that term is defined in the Regional Transportation Act. For the purpose of this Section, "based aircraft" are aircraft that are regularly hangared or tied-down at the restricted landing area or residential airport, or

that use it as their primary base of operation. As used in this Section 49.1, "restricted landing area" or "residential airport" shall have the meaning set forth in regulations of the Department in effect on the effective date of this amendatory Act of 1989, but shall not include amendments of the regulations adopted by the Department thereafter.

620 ILCS 5/79. Penalties

§ 5/79. Penalties. Except as otherwise specifically provided in this Act, any person other than the Department, its officers or employees acting for and on behalf of the Department, who has failed to comply with the requirements of, or who has violated any of the provisions of this Act, or the rules, rulings, regulations, orders or decisions of the Department issued pursuant thereto, shall be guilty of a Class A misdemeanor.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHARLES M. VORHEES, as Executor of the Last Will and Testament of Helen V. Brach, a person presumed dead,

Plaintiff,

vs.

KIRK BROWN, Secretary of the Illinois Department of Transportation; WILLIAM L. BLAKE, Director of the Division of Aeronautics of the Department of Transportation; COUNTY OF DUPAGE, a political subdivision of the State of Illinois; CITY OF NAPERVILLE, a municipality organized under the laws of the State of Illinois; CITY OF AURORA, a municipality organized under the laws of the State of Illinois; NAPER AERO CLUB, INC., an Illinois Not-For-Profit Corporation; and the HAZEL S. BRODIE TRUST,

Defendants.

Case No. 95 C 3812

Honorable Blanche Manning Judge Presiding

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Jurisdiction

1. This is a civil action arising under the Constitution and laws of the United States and is one over which this Court has original subject matter jurisdiction pursuant to Section 1331 of Title 28 of the United States Code.

2. That sought by Plaintiff is a judgment that Sec. 49.1 of the Illinois Aeronautics Act, Public Act 86-963 of the 86th General Assembly of the State of Illinois, 1945 Ill. Laws 335, effective July 1, 1990 (620 ILCS 5/49.1) is repugnant to the concepts of the Fifth Amendment to the Constitution of the United States and thereby and otherwise violative of the Fourteenth Amendment of it. This request by the Plaintiff for such a declaration of rights is made pursuant to the remedy therefor provided in the federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201.

Venue

3. Venue lies in the Northern District of Illinois by virtue of 2 8 U.S.C. Sec. 13 91 (b), in that each of the Defendants which are political subdivisions of Illinois by virtue of its constitution and statutes are situated in the Northern District of Illinois; and in that the Defendant KIRK BROWN has an official residence in Chicago, Illinois; and in that NAPER AERO CLUB, INC. has its principal office and conducts its activities within an unincorporated area of DuPage County; and in that the HAZEL BRODIE TRUST ("Brodie") is the owner of record of property situated in the County of DuPage and the use and enjoyment of which will be effected by that to be determined by this Court; and in that all to which the statute whose constitutionality is being drawn into question is by its provisions to apply and be enforced within this District.

The Parties

4. Plaintiff, Charles M. Vorhees ("Vorhees") , is the duly appointed acting and qualified Executor of the Last Will and Testa-

ment of Helen Brach, a person presumed dead. That the said will and thus the Estate of Helen Brach is being administered by Vorhees pursuant to the laws of the State of Illinois and under the supervision of the Circuit Court of Cook County, Probate Division given that it found her to have presumedly died a resident of the County of Cook on February 17, 1977.

5. Vorhees has succeeded to the ownership of an undivided one-half interest in a one-half section of land bisected by Route 59 and contiguous to the Cities of Naperville and Aurora and situated in an unincorporated part of DuPage County. He holds such through an Illinois land trust of the LaSalle National Bank, N.A., a national banking association which identifies such trust by the Number 116310. The interest of Vorhees had its origin in the acquisition in 1936 of the whole of such property by Frank Brach and Edwin Brach, brothers who at their deaths were respectively married to Helen Brach and Hazel Brodie.

6. Such property was then devoted to agricultural use and was sparsely improved with farm buildings -- a circumstance which persists with Vorhees' ownership. Within the last decade the area within which it lies has progressively been transformed from an area which was wholly rural in character and devoted primarily to farming to one which has been developed or is imminently to be developed for commercial, business and high density residential use. Due thereto, this property has become ripe for such kind of development and consequently the opportunity is now present for Vorhees to reap the benefit and reward therefrom. The realization by him of such, however, is highly dependent upon the ability to obtain authorization therefor from the County of DuPage or the Cities of Naperville and Aurora to erect buildings and other facilities thereupon which protrude into that which is superadjacent thereto and as well roadways upon which vehicles and persons will traverse within space superadjacent to the surface thereof. In addition, the capability to have developed these lands to their highest and best use is dependent upon provision being

procured for access thereto from the highly traveled and soon to be modernized Route 59 which is under the control of the Department of Transportation of the State of Illinois. The obtaining of all of such, however, will be prevented by any requirement that such property not be improved with anything which will obstruct flights ,emanating from or approaching the restricted landing area or residential airport which is constituted by runways of the Naper Aero Club, Inc. which are actively and constantly operated by it and lie contiguous to the southern boundary of the easterly half of the heretofore described property in which Vorhees is interested as an owner.

7. Defendant Kirk Brown as Secretary of the Illinois Department of Transportation and Defendant, William L. Blake as Director of the Division of Aeronautics of the Illinois Department of Transportation are in their official capacities responsible for the administration and enforcement of the Illinois Aeronautics Act, 620 ILCS 5/1, et seq.

8. Defendant County of DuPage is a political subdivision of the State of Illinois and as such does have authority to control development and improvement of properties which lie within its unincorporated areas through the application of the zoning powers with which it has been endowed by the various statutes of the State of Illinois in such case made and provided. And in addition and concomitant thereto it is mandated specifically by Sec. 33 of the Illinois Aeronautics Act (620 ILCS 5/33), to enforce and assist in the enforcement of laws of the State of Illinois pertaining to aeronautics and thereby in particular 620 ILCS 5/49.1, a statute which by its provision limits and restrains the development of Plaintiff's property and thereby to its full potential and as well means of access to such which would involve the movement of traffic through those areas superadjacent to its surface, all with the result that Vorhees and Brodie will be deprived of a large part of what is essentially the value of their said property.

9. Defendant City of Aurora which is partially situated in DuPage County is a municipality of the State of Illinois; and as such it has authority with respect to the development and improvement of properties which lie within its corporate boundaries and as well to influence such apart from annexation when such lie within 1-1/2 miles of it, 55 ILCS 5/5-12007. In particular, it has been endowed with authority to annex properties contiguous to it and zone them having regard to their appropriate usage. In the instance of the property in which the Plaintiff is interested, this power is also susceptible to practical exercise by such Defendant in that Plaintiff's property is contiguous to it and thereby subject to annexation by it under terms largely specified by it -something upon which the development of a property is dependent for it is through such that utilities and roadways necessary for the development and the use of a property to its highest and best use are obtained. The City of Aurora in recognition of this has contemplated the annexation of the westerly one-fourth square mile of the property of the Plaintiff by its entry into a restrictive agreement with the City of Naperville having regard thereto and as well through various enactments of it which have assumed its control over the extent, intensity and nature of the development to be permitted of it and thereby the structures and facilities to be erected within the area superadjacent to it. And as is the case with respect to the County of DuPage, it by virtue of its status as a political subdivision of the State of Illinois is mandated to enforce and assist in the enforcement of laws of that state pertaining to aeronautics and thereby in particular 620 ILCS 5/49.1. Accordingly, it has an ostensible mandate to subject any plan for development of Plaintiff's property to those considerations having to do with the presentation of hazards to airplane flights emanating from or approaching the runways of the proximate residential airport of the Naper Aero Club by virtue of any obstruction which would be constituted by any aspect of development of that superadjacent to the aforesaid lands of Vorhees and Brodie.

10. Defendant City of Naperville which is largely situated in DuPage County is a municipality of the State of Illinois; and as such it has authority with respect to the development and improvement of properties which lie within its corporate boundaries and as well to influence such apart from annexation when such lie within 1-1/2 miles of it, 55 ILCS 5 /5-12007. In particular, it has been endowed with authority to annex properties contiguous to it and one them having regard to their appropriate usage. In the instance of the property in which the Plaintiff is interested, this power is also susceptible to practical exercise by such Defendant in that Plaintiff's property is contiguous to it and thereby subject to annexation by it under terms largely specified by it -something upon which the development of a property is dependent for it is through such that utilities and roadways necessary for the development and the use of a property to its highest and best use are obtained. The City of Naperville in recognition of this has contemplated the annexation of the easterly one-fourth square mile of the property of the Plaintiff by its entry into a restrictive agreement with the City of Aurora having regard thereto and as well through various enactments of it which have assumed its control over the extent, intensity and nature of the development to be permitted of it and thereby the structures and facilities to be erected within the area superadjacent to it. And as is the case with respect to the County of DuPage, it by virtue of its status as a political subdivision of the State of Illinois is mandated to enforce and assist in the enforcement of laws of that state pertaining to aeronautics and thereby in particular 620 ILCS 5/49.1., Accordingly, it has an ostensible mandate to subject any plan for development of Plaintiff's property to those considerations having to do with the presentation of hazards to airplane flights emanating from or approaching the runways of the proximate residential airport of the Naper Aero Club, Inc. by virtue of any obstruction which would be constituted by any aspect of development of that superadjacent t o the aforesaid land of Vorhees and Brodie.

11. And, furthermore, the City of Naperville has recently demonstrated its determination to do so by that which it has provided by ordinance with regard to the annexation and zoning of that one-quarter section of property lying to the south of the southerly terminus of the Naper Aero Club, Inc.'s north/south runway and thereby restricting and regulating the use thereof as and for an accommodation of the airplane flights landing upon and taking off therefrom. In addition, it has altered a conventional plan for the widening of 83rd Street by providing for the adding of the increased width thereof by the taking of lands therefor only from the south side of such roadway. An expression of the rationale for these actions and others of similar tack taken and to be taken has been enunciated by the public response of a Corporation Counsel of it to the suggestion that all properties in the environs of the Naper Aero Club, Inc. were not to be made servient to its operations. That said in such regard was that it was "off the wall"—a colloquialism for something which is beyond the pale of rational consideration.

12. Defendant Naper Aero Club, Inc. is an Illinois not-for-profit corporation which owns and operates a residential airport and restricted landing area which were constructed in 1956 in an unincorporated portion of the County of DuPage and from which operations did then commence- to accommodate the fulfillment of the flying hobbies of its limited membership which do involve the operation by them personally of small airplanes. The essential facilities of it are two runways which each have a length of approximately 2,200 feet and lighting and navigational systems to aid take-offs and landings of such aircraft therefrom. Said runways extend from north to south and east to west, respectively. The northern terminus of the former is contiguous to the southern boundary of the aforesaid property of Vorhees and Brodie and the northern edge of the latter is contiguous thereto as well. In the instance of each runway, flights taking off from and landing thereupon must primarily utilize air space other than that superadjacent

to said Defendant's properties and most especially that superadjacent to the property of Vorhees and Brodie.

13. Defendant, the Hazel S. Brodie Trust ("Brodie") , is an inter vivos trust which has succeeded to the ownership of an undivided one-half interest in that same one-half square mile of land situated in an unincorporated part of DuPage County in which Vorhees has a similar interest as a beneficial owner. This property interest of Brodie had its origin in the acquisition in 1936 by it of Edwin Brach to whom Hazel S. Brodie was later married and who died while she was married to him. Brodie and the Plaintiff are therefore similarly situated and will be similarly effected by the determinations arising out of this action.

Claim For Relief

14. Important to and determinative of the value of vacant lands is their usefulness and suitability for development -factors which are in turn dependent upon a property's situation with respect to centers of population, public transportation facilities, arterial roadways, proximity to pathways of development and compatibility with the trend thereof. Concomitant thereto is the susceptibility of a property to improvement with structures that will accommodate the usages which are natural thereto and to obtain forms of access to surrounding major roadways which will accommodate this degree of development. This and the ability to achieve annexation to surrounding municipalities and the zoning for and building permits authorizing the improvement of a property to enable its utilization to its highest and best degree is sine qua non to the realization of the potential of its value. The denial of any such governmental authorization upon a basis which is not lawful is to diminish or to destroy illicitly the value of a property and amounts to the deprivation of its owners of their rights as guaranteed under the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

15. The property in which the Plaintiff has an interest as aforesaid consists of:

> The South West Quarter of Section Twenty-Seven (27), Township 38 North, Range 9, East of the Third Principal Meridian; Also, the South East Quarter of Section Twenty-Eight (28); Township 38 North, Range 9 East of the Third Principal Meridian.

This property has frontage only upon arterial highways and having a combined length of two miles divided equally between Route 59, a state highway, and 75th Street, a DuPage County roadway. Each is presently reputed to be traversed by somewhere between 15,000 and 30,000 vehicles daily and their intersection which lies at the southeast and southwest corners of the Plaintiff's property is a major hub of development. Route 59 has become a virtual corridor of development. 75th Street has also to a substantial degree become a nexus of development and its environs of further plans for development which are to be imminently fulfilled. In particular, a major shopping center has been in place for approximately four years at the northwest corner of the intersection of 75th Street with Route 59. To the south of the Plaintiff's property there has been developed since 1985 office and banking facilities and major residential areas and there is planning for immediate construction of high density residential and commercial development immediately to the east of Route 59 and one-half mile to the south of the Vorhees and Brodie property.

16. The cities of Aurora and Naperville have in their comprehensive plans projected the property of Plaintiff to be developed for intensive residential use and a business park, respectively. Accordingly, the naturally occurring and highest and best use for each segment of the Plaintiff's property calls for the construction upon it of high level structures and erection and the situation upon it of roadways to be traversed by vehicular traffic all of which requires the utilization of space superadjacent to its lands; and such as well does logically require provision for appropriate access for

each segment of the Vorhees and Brodie property to and from Route 59 and for controlled traffic movement through the area that of necessity must be situated at a point proximate or astride its southern boundary and at least partially within its easterly one-half and opposite to the northern terminus of the north/south runway of the Naper Aero Club.

17. This trend of development has been such as to have transformed that superadjacent to the lands of Vorhees and Brodie from that not involved with or integral to its use, enjoyment and value for the broad area within which these lands lie was one which had as its highest and best usage agriculture to one where its occupancy by structures and related improvements is that upon which the realization of the now greater value of such lands through business and high density residential usage is dependent.

18. Thus and therefore, despite the absence within the bounds of the property of the Naper Aero Club, Inc. of sufficient space for aircraft to take off and land, the right of Vorhees and Brodie to utilize that superadjacent to their lands is paramount and one that ought not be subject to the fetter of consideration for the requirements of flight operations to and from, the runways of the Naper Aero Club, Inc.

19. As a consequence and with the purpose of serving and protecting the predilection of the membership of the Naper Aero Club, Inc. to indulge in their avocation of flying of light aircraft for their personal convenience, the Illinois legislature enacted illicitly specialized and capricious legislation by adding a new section to the Illinois Aeronautics Act, which is designated Sec. 49.1 and was entitled "Creation of Hazards" and is as follows:

> Creation of Hazards. No person may create or construct any airport hazard which obstructs a restricted landing area or residential airport that (1) serves 20 or more based aircraft, and (2) is located within the ‚metropolitan region'

as that term is defined in the Regional Transportation Act.[1] For the purpose of this Section, 'based aircraft' are aircraft that are regularly hangared or tied-down at the restricted landing area or residential airport, or that use it as their primary base of operation. As used in this Section 49.1, 'restricted landing area' or 'residential airport' shall have the meaning set forth in regulations of the Department in effect on the effective date of this amendatory Act of 1989, but shall not include amendments of the regulations adopted by the Department thereafter.

Laws 1945, p. 335, Sec. 49.1, added by P.A. 86-963, Sec. 1, eff. July 1, 1990.11

20. Enforcement thereof as has been previously noted herein is placed in the defendants Kirk Brown and William L. Blake by virtue of their official offices and as well in those other defendants which are political subdivisions of the State of Illinois by virtue of Section 33 of the Illinois Aeronautics Act which is as follows:

115/33. **Enforcement of aeronautics laws**

Sec. 33. Enforcement of aeronautics laws. It shall be the duty of the Department, its officers, and such of its employees as are designated by it to do so, to enforce and assist in the enforcement of all laws of this State pertaining to aeronautics, and of all rules, rulings, regulations, orders and decisions issued by the Department pursuant thereto, and in aid of such enforcement, general police powers are hereby conferred upon the Department, each of its officers, and such of its employees as are designated by it to exercise such powers. It shall also be the duty of every State, county and municipal officer charged with the enforcement of State and municipal 'laws to enforce and assist in the enforcement of all laws of this State pertaining to aeronautics."

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[1] 70 ILCS 3615/1. 01 *et seq.*

21. The Naper Aero Club has consistently and vehemently through petition to the Illinois legislature and to the Illinois Department of Transportation and to the municipality of Naperville and as well through representations of its principals and agents promulgated its claim of entitlement as a matter of law to the unfettered utilization of that superadjacent to all the lands proximate to its runways for flight operations from and to- them and implicitly of its intent to avail itself the benefits accorded it through the enactment of and by virtue of the provisions of the Illinois Aeronautics Act Sec. 5/49.1 and the various processes of law it perceives it can cause to be applied therefor.

22. The assumption abroad as to the validity of the provisions of such Section 5/49.1 and of its enforceability has diminished the value of the aforesaid property of Vorhees and Brodie in the market place and has created the perception generally that its property cannot be improved effectively and that thereby there cannot be achieved its highest and best use and a full realization of its inherent value; and furthermore, they have by reason of the premises been inhibited from and deterred from devising plans for the development of their properties for their highest and best use and from seeking the annexation and zoning thereof in accord with a plan of development which would not be subjected to consideration with regard to low over flights of its property by aircraft emanating from and approaching the runways of the Naper Aero Club, Inc.

23. It is apparent from that hereinabove set forth that any effort made to procure from the various Defendants which constitute political subdivisions of the State of Illinois authorization to proceed to develop the property of Vorhees and Brodie to its highest and best use and apart from the adverse impact thereupon of the enforcement of the provisions of Section 5/49.1 would have been unavailing and thus an exercise in futility.

24. That another and immediate consequence thereof has been the refusal by the Illinois Department of Transportation to have in

the course of its planning for the modernization and widening of Route 59 to make provision for access from Route 59 to the property of Vorhees and Brodie with the effect that there is to be denied to them the right to develop their property to its highest and best use.

25. By reason of the premises the enactment and prevalence of Sec. 49.1 of the Illinois Aeronautics Act has erected such substantial barriers to the development and improvement of the Vorhees and Brodie property so as to have effectively usurped their right to realize the value thereof upon the basis of its potentiality for full and complete development to its highest and best use. The discriminatory effect of this section of the Illinois Aeronautics Act is not justified by any legitimate public purpose and is arbitrary and capricious with respect to the right of Vorhees and Brodie to a full and legitimate use of their aforesaid property.

26. For the reasons herein stated Section 49.1 of the Illinois Aeronautics Act is repugnant to the limitation placed by the United States Constitution on the power of states to deprive persons of their right to their property.

27. By virtue of the facts alleged herein a present and actual controversy exists between the Plaintiff and it is one ripe for adjudication by this court. Plaintiff is without an adequate remedy at law for the substantial irreparable injury with which he is threatened and requires permanent injunctive relief to protect and preserve his rights.

WHEREFORE, Plaintiff prays that this Court enter a final judgment and decree herein:

(A) declaring Section 49.1 of the Illinois Aeronautics Act (620 ILCS 5/49.1) void and without force or effect as repugnant to the concepts of the Fifth Amendment of the Constitution Of the United States and thereby and otherwise violative of the Fourteenth Amendment of it and that there be permanently enjoined the enforcement of

such Illinois statute by Defendants Kirk Brown and William L. Blake and their respective successors in office;

(B) declaring any regulations, rules and compliance plans approved by the Defendants Kirk Brown and William L. Blake pursuant to Section 49.1 of the Illinois Aeronautics Act (620 ILCS 5/49.1) void and of no effect;

(C) permanently enjoining any enforcement and application of Sect ion 5/49.1 of the Illinois Aeronautics Act by the Defendants DuPage County, City of Naperville and City of Aurora;

(D) enjoining any effort to have applied through any civil proceeding by the Defendant Naper Aero Club, Inc. of Section 5/49.1 of the Illinois Aeronautics Act;

(E) granting Plaintiff such other or further relief as may be proper and warranted under the circumstances; and

(F) retaining jurisdiction of this action against the event that further proceedings may be required to implement its judgment.

DATED: November 2, 1995.

s/Edward V. Donovan, Jr.

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